SHUNMUGA VADEVU S ATHIMULAM & ORS

v.

THE MALAYSIAN CO-OPERATIVE INSURANCE SOCIETY LTD & ANOR

HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
[ORIGINATING SUMMONS NO: 24-324-97]
24 JUNE 1998

CIVIL LAW ACT: *Insurance - Life insurance policy - Whether part of assets of deceased's estate - Whether insurer obliged to pay policy moneys to nominee directly - Civil Law Act 1956, s. 23(1) - Insurance Act 1996, s. 166(2)*

INSURANCE: *Life insurance - Nominee - Trustee - Trust in favour of wife - No trustee appointed under policy - Person deemed trustee under Insurance Act 1996 - Whether policy holder can revoke nomination without trustee's written consent - Insurance Act 1996, ss. 164, 166*

STATUTORY INTERPRETATION: *Construction of statutes - Statutes of general application - Whether overridden by statutes of later and more specific application - Civil Law Act 1956, s. 23(4) - Insurance Act 1996, s. 166(3)*

The first plaintiff was the widow of the deceased who had held a group life insurance policy ('the policy') with the first defendant insurance company. The second and third plaintiffs were two of their three children. The third child was a minor.

The deceased had nominated the first plaintiff as his nominee under the policy and subsequently purported to nominate the second defendant as a nominee for the same policy, describing her as his "wife". The deceased had not at any time been married to the second defendant.

Section 164(1) of the Insurance Act 1996 ('the Insurance Act') provides that a nomination shall be revoked by any subsequent nomination. However, s. 166(4) of the Insurance Act provides that where the nominee under a policy is a spouse or child, the policy owner shall not revoke the nomination without the written consent of the trustee, who, by virtue of s. 166(3), is the nominee, if no trustee is appointed under the policy.

The first plaintiff prayed for an order that the moneys be paid directly to her, relying on s. 166(3) of the Insurance Act, or alternatively, that the moneys be paid to the deceased's personal representatives under s. 23 of the Civil Law Act 1956 ('the CLA'). The difficulty arose from the apparent conflict between

s. 23(4) of the CLA which provides that where no trustee is appointed under the policy, the policy vests in the deceased's personal representatives as trustees, and, s. 166(3) of the Insurance Act which provides that the nominee shall be the trustee.

Held:

[1] The CLA is an earlier Act and general in nature, while the Insurance Act is a later Act and specific in nature. Therefore, where the provisions of the two Acts conflict, the later and specific Act shall prevail. As such, s. 23 of the CLA has been rendered superfluous in view of the provisions of the Insurance Act, which should be given effect to.

[2] The first plaintiff was at all material times the wife of the deceased and she was nominated as a nominee under the policy. The deceased had not at any time appointed a trustee for the policy moneys. Thus, by virtue of s. 166(3) of the Insurance Act, the first plaintiff, as nominee, was the trustee. Thus, her written consent was required to effect any revocation of nomination. No such written consent was obtained and as such, the purported nomination of the second defendant was void.

[3] Section 23(1) of the CLA and s. 166(2) of the Insurance Act provide that where the beneficiaries of a life insurance policy are the spouse or children of the insured, the moneys payable shall not form part of the insured's estate. Section 165(1) of the Insurance Act further provides that where a nomination is made, the insurer is to pay the policy moneys according to the nomination. As the first plaintiff was the only nominee and sole beneficiary under the policy, she was entitled to be paid in her own right.

[Application allowed; first defendant to pay half the first plaintiff's costs, with no order as to costs against the second defendant.]

Cases referred to:

Kishabai v. Jaikishan [1981] 2 MLJ 289 ***(refd)***
Manomani v. Great Eastern Life Assurance Co Ltd [1991] 1 CLJ 141 ***(foll)***
Re Man Mihat (Deceased) [1965] 2 MLJ 1 ***(foll)***

Legislation referred to:

Civil Law Act 1956, ss. 23(1), (4), (5)
Civil Law Ordinance 1956, s. 23
Insurance Act 1996, s. 164(1), 165(1), 166(1), (2), (3), (4)

For the plaintiffs - Zarizana Abdul Aziz; M/s K Ahmad & Yong
For the 1st defendant - Kenneth Goh (En Yeoh with him); M/s Othman Hashim & Co
For the 2nd defendant - Habib Rahman (En Tharumarajah with him); M/s T Tharuma & Assoc

Reported by Anne Khoo

JUDGMENT

Abdul Hamid Mohamad J:

The facts are not in dispute. The first plaintiff is the widow of the deceased policy owner. They have three children, two of them are the second and third plaintiffs. The third child is a minor. The marriage was still subsisting at the time of the death of the deceased.

During his life time, the deceased took out a Group Life Assurance Policy No. GL 00570028. The deceased nominated the first plaintiff as his nominee for the said policy.

Subsequently, the deceased purportedly nominated the second defendant as a nominee for the same policy. In the nomination form he described the second defendant as his "wife" In fact the second defendant was not his wife. The deceased did not obtain a written consent of the first plaintiff when he nominated the second defendant.

The question is who is entitled to the policy moneys? Section 23 of the Civil Law Act 1956 provides:

> 23.(1) A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife or of his children or of his wife and children or any of them, or by any woman on her own life and expressed to be for the benefit of her husband or of her children or of her husband and children or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not as long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts.
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> (2) If it is proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid.
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> (3) The insured may by the policy or by any memorandum under his or her hand appoint a trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy.
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> (4) In default of any such appointment of a trustee the policy immediately on its being effected shall vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid.
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> (5) If at the time of the death of the insured or at any time afterwards there is no trustee, or it is expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by the High Court.

(6) The receipt of a trustee or trustees duly appointed, or in default of any such appointment or in default of notice to the insurance office the receipt of the legal personal representative of the insured, shall be a discharge to the office for the sum secured by the policy or for the value thereof in whole or in part.

Section 164 of the Insurance Act 1996 provides:

164. (1) A nomination, including a nomination to which section 166 applies, shall be revoked -

(a) upon the death of the nominee, or where there is more than one nominee, upon the death of all the nominees, during the life-time of the policy owner;

(b) by a notice in writing given by the policy owner; or

(c) by any subsequent nomination.

(2) Subject to subsection (1), a nomination shall not be revoked by a will or by any other act, event or means.

(3) Where there is more than one nominee and one of the nominees predeceases the policy owner, in the absence of any subsequent nomination by the policy owner disposing of the share of the deceased nominee, the licensed insurer shall pay the share to the remaining nominees in proportion to their respective shares.

Section 165(1) of the Insurance Act 1996 provides:

165. (1) Subject to subsection (2), where a policy owner dies having made a nomination, the licensed insurer shall pay the policy moneys of the deceased policy owner according to the direction of the nomination upon receipt of a claim by the nominee and the claim is accompanied by proof of death of the policy owner.

(2) Where a nominee fails to claim the policy moneys within sixty days of the licensed insurer becoming aware of the death of the policy owner, the licensed insurer shall notify the nominee in writing at his last known address of his entitlement to claim the policy moneys.

Section 166 of the same Act provides:

166 (1) A nomination by a policy owner, other than a Muslim policy owner, shall create a trust in favour of the nominee of the policy moneys payable upon the death of the policy owner, if -

(a) the nominee is his spouse or child; or

(b) where there is no spouse or child living at the time of nomination, the nominee is his parent.

(2) Notwithstanding any written law to the contrary, a payment under subsection (1) shall not form part of the estate of the deceased policy owner or be subject to his debts.

(3) The policy owner, by the policy, or by a notice in writing to the licensed insurer, may appoint trustees of the policy moneys and where there is no trustee -

(a) the nominee who is competent to contract; or

(b) where the nominee is incompetent to contract, the parent of the incompetent nominee and where there is no surviving parent, the Public Trustee,

shall be the trustee of the policy moneys and the receipt of a trustee shall be a discharge to the licensed insurer for all liability in respect of the policy moneys paid to the trustee.

(4) A policy owner shall not deal with a policy to which subsection (1) applies by revoking a nomination under the policy, by varying or surrendering the policy, or by assigning or pledging the policy as security, without the written consent of the trustee.

(5) Nothing in this section shall prejudice a creditor of a policy owner from applying to the court for a declaration that this section, wholly or partly, is inapplicable to any particular policy on the ground that the premiums under that policy were paid to defraud the creditor.

From the above provisions it appears clear to me, on the facts of this case, that, first where a policy of assurance is effected by a man on his own life and expressed to be for the benefit of his wife a trust is created in favour of the wife and the moneys payable under such policy shall not form part of the estate of the insured – s. 23(1) of the Civil Law Act 1956 and s. 166(1) and (2) of the Insurance Act 1996.

In *Kishabai v. Jaikishan* [1981] 2 MLJ 289, B.T.H. Lee J, *inter alia*, held that the purpose of s. 23 of the Civil Law Ordinance 1956 was to protect the interests of the widow and the children of a deceased assured who had created a trust in their favour pursuant to its provision.

In *Re Man bin Mihat Deceased* [1962] 2 MLJ 1, Suffian J (as he then was) held, *inter alia*, that by virtue of s. 23 of the Civil Law Act 1956, as the policy of assurance effected by the assured on his own life and expressed to be for the benefit of his wife, the moneys payable under the policy did not form part of the estate of the deceased.

In *Manomani v. Great Eastern Life Assurance Co. Ltd.* [1991] 1 CLJ 141; [1991] 1 MLJ 364, Eusoff Chin J (as he then was) held, *inter alia*:

(2) As far as the wife and child of the deceased were concerned, it was crystal clear that by virtue of s. 23 of the Civil Law Act 1956 as the policy of assurance was effected by the assured on his own life and expressed to be for the benefit of his wife and child, the moneys payable under the second policy did not form part of the deceased's estate. The moneys under the second policy should therefore have been paid out by the defendant to the widow of the deceased and the Official Administrator committed an error when he requested for these moneys to be paid to him for his distribution under s. 83 of the Probate and Administration Act 1959.

It is clear to me that, had there been no subsequent nomination of the second defendant the policy moneys would have to be paid to the first plaintiff.

What is the effect of the purported nomination of the defendant by the deceased?

Section 164(1) of the Insurance Act 1996 provides, *inter alia*, that a nomination including a nomination to which s. 166 applies shall be revoked by any subsequent nomination. Hence, learned counsel for the second defendant argued that when the second defendant was nominated by the deceased, the earlier nomination of the first plaintiff was revoked.

However s. 166 provides, *inter alia*, that when a nominee is a spouse or a child a trust is created in favour of the nominee. Subsection (3) of s. 166 provide that where no trustees are appointed the nominee, who is competent to contract, shall be the trustee. Further sub-s. (4) provides, *inter alia*, that in such a situation (ie the nominee is the spouse or the child) the policy owner shall not deal with the policy by revoking the nomination without written consent of the trustee.

Similarly, s. 23 of the Civil Law Act 1956 provides that where a spouse or children is/are nominee(s), a trust is created in favour of such nominee(s) and the moneys payable under any such policy shall not as long as any object of the trust remains unperformed form part of the estate of the insured or be subject to his or her debts. This has been confirmed by the courts a number of times which includes cases referred to earlier.

However, sub-s. (4) of s. 23 of the Civil Law Act 1956 says that where no trustee is appointed the policy shall immediately on its being effected vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid. Subsection (5) of the same section empowers the court to appoint a trustee if, *inter alia*, at the time of the death of the insured there is no trustee.

This, especially sub-s. (4) of s. 23 of the Civil Law Act 1956, appears to conflict with the provision of sub-s. (3) of s. 166 of the Insurance Act 1996 which says that where no trustee is appointed and the nominee is a spouse or a child of the policy owner and is competent to contract the nominee shall be the trustee. If the nominee who is a spouse or the child is incompetent to contract, his or her parent, and if none, the Public Trustee shall be the trustee.

It is because of this apparent conflict and uncertainty that learned counsel for the first plaintiff prayed in the alternative, that is, first, that the moneys be paid to the first plaintiff directly or, alternatively, to the personal representatives of the policy owner who will pay it to her.

The Civil Law Act 1956 is an earlier Act general in nature, whereas the Insurance Act 1996 is a later Act **and** is specific in nature ie, insurance. Therefore where the provisions of that two Acts conflict then the latter and specific Act should prevail. Indeed, it appears to me that s. 23 of the Civil Law Act 1956 has been rendered superfluous in view of the provisions of the Insurance Act 1996. Effect should be given to the provisions of the Insurance Act 1996.

Coming back to the facts of this case. The first plaintiff was at the material time the wife of the deceased (policy owner). She was nominated as a nominee of the policy. The second defendant was **not** his wife even though in the nomination form by which the deceased purported to nominate her subsequent to the nomination of the first plaintiff, he stated that she was his wife. This a clearly a misrepresentation to the first defendant. No trustee was appointed by the deceased following the nomination of his wife (first plaintiff) or purported nomination of the second defendant (who was not his wife). No written consent of the first plaintiff was obtained when he purportedly nominated the second defendant in place of the first plaintiff.

I am of the view that the purported nomination of the second defendant is void because by virtue of sub-s. (3) of s. 166 of the Insurance Act 1996 the first plaintiff is a trustee and her written consent was not obtained as required by sub-s. (4) of the same section and Act.

By virtue of sub-s. (2) of s. 166 (and also sub-s. (1) of s. 23 of the Civil Law Act 1956 and the authorities referred to earlier) the policy moneys do not form part of the estate of the deceased. Section 165(c) of the Insurance Act 1996 provides that where a policy owner dies having made a nomination (in this case, nomination of the first plaintiff). “The licensed insurer shall pay the policy moneys of the deceased policy owner according to the direction of the nomination ...”. As the first plaintiff is the only nominee and sole beneficiary, in my judgment, she is entitled to be paid in her own right.

In the circumstances I ordered that the policy moneys be paid to the first plaintiff.

Regarding costs, learned counsel for the first plaintiff submitted that the first plaintiff should be given the full costs against the first defendant (the insurance company) because, she argued that had the first defendant obtained a legal opinion they would have known that they should pay the moneys to first plaintiff. I do not think it is fair to blame the first defendant in this case. If somebody is to be blamed it is the deceased. He had made a subsequent nomination without obtaining the written consent of the first plaintiff. He had misrepresented to the first defendant that the second defendant was his wife. Indeed at the hearing, learned counsel for the first defendant had argued in support of the argument of the learned counsel for the first plaintiff. In the circumstances I only allowed ½ costs to the first plaintiff as against the first defendant. The second defendant (present appellant) should have no complaints as I did not order any costs be paid by her.